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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-292

EMPIRE FIRE AND MARINE INSURANCE COMPANY, et al.,

Petitioners,

—against—

DIETRICH MEYERHOFER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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1.

Respondents attempt to obscure the importance of the issues raised in the petition by asserting that the decision of the court of appeals has no significance beyond the facts of this case (Respondents' Brief, p. 4). But such an assertion cannot belie the fact that with increasing frequency attorneys are being named along with their clients as defendants in federal securities class actions. Nor can it be denied that the unprecedented decision of the court of appeals will have a far-reaching effect on each such case, each such attorney and each such client. Under the

court's holding a client may be deprived of the protection of the attorney-client relationship and subjected to unsupervised disclosures of cliental information whenever the client and attorney are named as defendants in the same lawsuit. The guidance of this Court on issues of such moment both to the public and to the Bar is urgently needed.

2.

We respectfully invite the Court's attention to the following statement appearing at the conclusion of respondents' counterstatement of facts in their opposing brief (page 8):

> "The story Goldberg told [to the Bernson firm] was the one recited above and which revealed that Goldberg himself had been the victim of a fraud such that no genuine attorney-client relationship had ever arisen between him and Empire as to the matter in issue here (Goldberg SEC Affidavit; Sealed Goldberg Affidavit of June 21, 1973)."

In the same vein, later in their brief respondents state (page 17):

> "A turncoat has few equities. The faithless party to this relationship, however, was not the attorney but the client, whose fraud on Goldberg had placed Goldberg's entire career in jeopardy."

These statements graphically illustrate respondents' myopic and obfuscating response when confronted with an inquiry into the conduct of an attorney who in effect bought his freedom from involvement in a lawsuit by delivering up his former client to the attorneys prosecuting the case.

Respondents present to the Court, as the "facts" of the case only the "story" which Goldberg told the Bernson firm, in secret and without notice to Empire. Without the slightest compunction, respondents ask the Court to assume the truth of the "story" although Empire was never given an opportunity to be heard with respect thereto and although it was told by one who was admittedly preoccupied only with extricating himself from the lawsuit and protecting his career. Notwithstanding the pendency of the litigation before a federal court, respondents unilaterally determined, on the basis of Goldberg's secret, unsupervised and self-serving disclosures, that Goldberg was innocent, Empire was guilty and that, therefore, there was no attorney-client relationship between Empire and Goldberg which Goldberg was obligated to respect. A more pernicious argument could not be imagined. Its mere articulation underscores the unfairness and appearance of unfairness of the procedure sanctioned by the decision of the court of appeals, i.e., permitting an attorney named as a co-defendant with his former client to extricate himself from the lawsuit by secretly disclosing to the plaintiffs' attorneys, without notice to his client or the supervision of the court, all he knows about the former client and the subject matter of the suit—in effect securing his freedom from the litigation by delivering up his former client.

If this decision is permitted to stand, no client can be expected to confide in his attorney about a securities law matter which might ultimately lead to litigation. No attorney can in good conscience talk to his client without first warning the client that if he is ever named with the client in a lawsuit, the attorney can secretly disclose—without the client's permission and without notifying the client—information imparted to him by the client in confidence in order to attempt to extricate himself, the attorney, from the lawsuit.

3.

Respondents cite *Clark* v. *United States*, 289 U.S. 1 (1933) to support their argument that where a client deceives an attorney in relation to the subject matter of their association, as they allege Empire did here, the attorney-client relationship never arises and thus there can be no duty of confidentiality (Respondents' Brief, pp. 14-15). Yet respondents ignore the language in the *Clark* case indicating in no uncertain terms that it is the function of a court of law, not of a client's adversaries or of a client's former attorney negotiating his release from a lawsuit, to determine whether a client has so abused the relation that the protection of the attorney-client privilege no longer survives. This Court has stated: "A privilege surviving until the relation is abused and *vanishing when abuse is shown to the satisfaction of the judge* has been found to be a workable technique for the protection of the confidences of client and attorney" (emphasis added). *Clark* v. *United States*, *supra* at 16. Again, in a passage quoted by respondents themselves at page 17 of their brief, the theme is reiterated: "It is then the function of a court to mediate between them. . . ." *Id.* at 13. Clearly, the *Clark* case offers no support for Goldberg's and the Bernson firm's unilateral, secret and unsupervised communications or their determination that Empire had deceived Goldberg and that Goldberg owed no duty of loyalty to his former client.* The clandestine disclosures which occurred in this case

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* Nor does *Carey* v. *Tannahill*, 1 Hill 33 (N.Y.Sup. Ct. 1841) also cited by respondents at page 15 of their brief. The court in that case stated with respect to an attorney's refusal to answer certain questions on the ground that it would violate the confidence reposed in him by his client:

> "But that was a question for the referees—not the witness [the attorney]. When the facts are disclosed, it is for the court to decide whether the witness should be required to answer." *Carey* v. *Tannahill*, *supra* at 36.

are inimical to the fairness of court proceedings and the public's confidence in the legal system.

Respondents' contention that Goldberg's disclosures to the Bernson firm were not technically privileged is irrelevant and, in addition, is based on the unsupported premise that during the many hours of conversation between Goldberg and the Bernson firm, during which Goldberg admittedly revealed all that he knew about his former client, the bounds of the attorney-client privilege were allegedly never transgressed. Furthermore, it is well established that the scope of Canon 4 of the Code of Professional Responsibility is broader than the attorney-client privilege in the evidentiary sense. Indeed EC 4-4 expressly states:

> "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

Thus, completely apart from the evidentiary issue of privilege, the making and acceptance of the unsupervised disclosures in question were clearly improper.

4.

The counterstatement of facts in respondents' brief represents an appeal to passion and prejudice. In an obvious attempt to tar Empire, respondents' brief is replete with egregious factual misstatements, inflammatory accusations and statements which have no foundation in the record. For example, respondents claim that Empire engaged in willful, fraudulent conduct, including the commission of perjury before the SEC (Respondents' Brief, p. 10). There

is absolutely no basis whatsoever in any portion of the record for such an accusation. Respondents also state that Empire willfully failed to disclose certain aspects of the fee arrangement with its attorneys. Again, there is nothing in the record indicating that the claimed omission, assuming disclosure was required, was willful on Empire's part. Respondents conclude that Empire "deceived" Goldberg and base much of their argument on this assumption. The assumption is not true as a fact and is completely unsupported by the record in this case. The contention is also ironic, since the alleged fraud laid at the client's door relates to the compensation to be received by Goldberg's own firm. It has never been explained how a client defrauds an attorney preparing a registration statement with respect to that attorney's failure to disclose his own fee.

5.

Although the district court and the court of appeals rejected respondents' "criminal conduct and continuing wrong" arguments as well as their theory that the Bernson firm was ethically obligated under EC 7-10 and DR 7-102(A)(1) to receive Goldberg's disclosures, respondents again present them to this Court. The suggestion that Empire was charged with criminal conduct or that the facts in any way would support such a charge is totally specious. No such allegation was contained in the complaint. Even if there had been such a charge, Goldberg was nevertheless obligated under the Code of Professional Responsibility, DR 7-102(B)(1), to at least notify Empire prior to his disclosures to plaintiffs' attorneys. The district court so held (Petition Appendix A, p. 7a).

The consideration respondents assert must be accorded all persons in a lawsuit under EC 7-10 might have been properly effectuated if the Bernson firm had taken Gold-

berg's deposition instead of meeting with him in secret. This procedure would have safeguarded both Empire's and Goldberg's rights and been consistent with the appearance of propriety. The failure to follow this procedure was never explained by respondents and the court of appeals did not address itself to this point in its decision.

Finally, respondents' theories, including their argument that DR 4-101(C)(4) permits an attorney, without his client's consent, to disclose clietal information to defend himself against an accusation of wrongful conduct, even if the accusation does not come from the client, miss the crucial point. Neither Canon 4 nor the exception cited by respondents nor any other provision of the Code of Professional Responsibility authorizes an attorney to make such disclosures unilaterally, in secret, without prior notice to his former client and without the supervision of a court of law.

CONCLUSION

If the decision of the court of appeals is permitted to stand, public confidence in the procedural and substantive fairness of securities class actions in the federal courts must suffer. Clients will have good cause to fear that the information they impart to their attorneys may be used as barter in the event of future litigation. Lawyers will be seen as a class favored by the courts. Nothing could be more destructive of the public's confidence in the Bar and the fairness of judicial proceedings, especially since the field of federal securities class litigation has long been the subject of discussion and criticism with respect to potential abuses. This case, with such far-reaching implications for

our entire system of justice, surely warrants review by this Court.

Respectfully submitted,

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